Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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No. 86-1136

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

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CLEMENT J. PACYNA, PETITIONER

v.

JOHN O. MARSH, Jr., SECRETARY OF THE ARMY

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ON PETITION FOR REHEARING OF AN ORDER DENYING PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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# BRIEF FOR THE PETITIONER

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## QUESTION PRESENTED

Is the decision of the court below barring suit on limitations, in which suit mandamus is part of an important ground for relief and a clear right to issue tolling until 1988 for resubmittance, supported by substantial evidence, not an adverse affect or aggrievement within relevant statute, and not otherwise an infringement on Amendments I, V and XIV ?

CERTIFICATION

The petitioner hereby certifies that this petition for rehearing is restrictive to intervening circumstances of substantial or controlling effect or to other substantial grounds not previously presented, and that it is presented in good faith and not for delay, pursuant to Rule 51 of this Court.

S/Clement J. Pacyna
CLEMENT J. PACYNA
Petitioner-Appellant, Pro se

## TABLE OF CONTENTS

Page

Opinions below..... 1

Jurisdiction..... 1

Statement..... 2

Argument: POINT I..... 3

THE COURT BELOW FAILED TO CONSIDER IMPORTANT GROUNDS FOR RELIEF.

POINT II..... 5

THE BARRING UNDER §2401(a) OF THE MANDAMUS CLAIM TIMELY FILED IN 1983 HAS AN ADVERSE AFFECT OR AGGRIEVEMENT WITHIN RELEVANT STATUTE.

Conclusion..... 6

Appendix:

Letter/order of U.S. Supreme Court, May 18, 1987.....

## TABLE OF AUTHORITIES

Statutes:

10 U.S.C. §702..... 4,5
10 U.S.C. §1552..... 2,3,4,5
28 U.S.C. §1254(1)..... 2
28 U.S.C. §1346..... 3
28 U.S.C. §1361..... 3
28 U.S.C. §2401(a)..... 3,4,5

United States Constitution, Amendments I, V and XIV..... 6

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## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A2-A4) is reported at 809 F.2d 792. The opinion of the district court (Pet. App. B2-B8) is reported at 617 F. Supp. 101.

## JURISDICTION

The judgment of the court of appeals (Pet. App. A1) was entered on November 13, 1986. The judgment of the district court

(Pet. App. B1) was entered March 3, 1984. The final decision of the Army Board for Correction of Military Records (ABCMR) (Pet. App. E) was entered July 20, 1982. The letter/order of this Court denying petition for a writ of certiorari, the appendix annexed hereto, was entered on May 18, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The petitioner filed a grievance with the ABCMR on June 13, 1980, seeking correction of an error or injustice in his army record pursuant to 10 U.S.C. §1552. Petitioner claimed primarily that a promotion denied him was the result of the army's violations of its own regulations, and therefore should be reversed with compensatory relief retroactive to date of infraction. The ABCMR denied the application on the ground that petitioner failed to submit sufficient relevant evidence

to demonstrate the existence of probable material error or injustice. The ABCMR decision caused petitioner to suffer a wrong, clearly evidenced on the face of the record (Pet. App. D). Suit was filed in the district court on February 23, 1983. Petitioner's suit was predicated upon not one but rather two jurisdictional legs upon which this action stands: (1) 28 U.S.C. §1346 for monetary relief and (2) 10 U.S.C. §1361 for non-monetary or mandamus relief created by 10 U.S.C. §1552.

The court of appeals affirmed the district court's decision that suit was barred by the six-year statute of limitations under 28 U.S.C. §2401(a), finding that petitioner's argument that the court must review the ABCMR decision is contrary to law.

ARGUMENT

POINT I

THE COURT BELOW FAILED TO CONSIDER IMPORTANT GROUNDS FOR RELIEF.

Petitioner's non-monetary claim challenging the ABCMR's own wrongful decision on July 20, 1982, pursuant to §1552 tolls under §2401(a). Therefore, the court overlooked the fact that petitioner can resubmit his mandamus suit until July 20, 1988.

However, the court could resolve the mandamus part of his suit without further burdening the court, since the matter is already and has been before the court since suit was filed in 1983 or almost four (4) years ago.

Petitioner vehemently contends, that the court below failed to address his non-monetary claim. The decision of the court barring petitioner's mandamus claim by rumaging outside the rules under the ruse of the statute of limitations is simply erroneous, unsupported by any statute, and contrary to 10 U.S.C. §702, which

provides for "right of review" of agency wrong, created by §1552.

POINT II

THE BARRING UNDER §2401(a) OF THE MANDAMUS CLAIM TIMELY FILED IN 1983 HAS AN ADVERSE AFFECT OR AGGRIEVEMENT WITHIN RELEVANT STATUTE.

Where Congress under 10 U.S.C. §1552 has authorized the ABCMR to correct military record of error or injustice in the interest of justice and has provided 10 U.S.C. §702 for judicial review of those actions, inquiry as to standing must begin with determination of whether statute in question authorizes review at behest of the plaintiff. The failure of the court below to review petitioner's mandamus part of his suit that military violated its own rules and regulations in prejudice of one of its members or petitioner in denying him promotion, therefore has an adverse affect or aggrievement within said relevant statutes.

Petitioner has met the three elements which must exist before mandamus can issue: plaintiff has a clear right to the relief, the defendant has a clear duty to act, and no other adequate remedy is available.

The decision below and this Court's order herein denying writ are substantially prejudicial and so severe and serious as to infringe on Amendments I, V and XIV, if they are not reversed.

## CONCLUSION

For the foregoing reasons, this Court should grant the petition for rehearing, reverse its order, and reverse the decision below or vacate and remand it on the mandamus claim.

Respectfully submitted.

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June 2, 1987

# APPENDICES

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

May 18, 1987

Mr. Clement J. Pacyna
1151 Wehrle Drive
Williamsville, NY 14221

Re: Clement J. Pacyna,
v. John O. Marsh, Jr.,
Secretary of the Army
No. 86-1136

Dear Mr. Pacyna:

The Court today entered the following order in the above entitled case.

The petition for a writ of certiorari is denied.

Very truly yours,

T/Joseph F. Spaniol, Jr.,
Clerk

S/Joseph F. Spaniol, Jr.